

JOE A. CONNER
Direct Dial (423) 752-4417
Direct Fax (423) 752-9527
E-Mail Address jconner@bakerdonelson.com

RECEIVED
2004 JAN 16 AM 9:25

T.R.A. DOCKET ROOM

1800 REPUBLIC CENTRE
633 CHESTNUT STREET
CHATTANOOGA, TENNESSEE 37450
PHONE 423 756 2010
FAX 423 756 3447

www.bakerdonelson.com

January 15, 2004

Chairman Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Via Federal Express
Priority Overnight Delivery

**Re: Joint Petition of Tennessee-American Water Company and Marion County,
Tennessee, for Approval of Purchase Agreement
TRA Docket No. 03-00388**

Dear Chairman Tate:

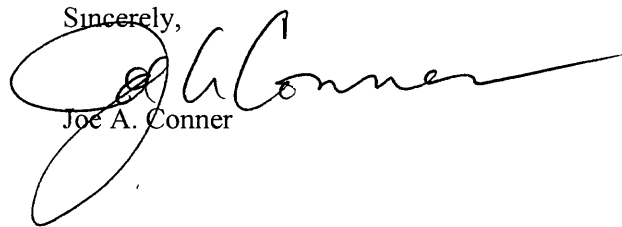
Please find enclosed the original and fourteen copies of each of the following documents for filing in the above-referenced matter:

- (1) Direct Testimony of James R. Hamilton;
- (2) Direct Testimony of Dan Bailey; and
- (3) Memorandum in Support of Petition.

Please stamp the extra copies "filed" and return them to me in the enclosed envelope.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions about this filing.

Sincerely,



Joe A. Conner

JAC:klc
Enclosures

C JAC 290849 v1
2015477-000017 01/15/2004

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

RECEIVED

2004 JAN 16 AM 3:27

JOINT PETITION OF)
TENNESSEE-AMERICAN WATER)
COMPANY AND MARION COUNTY,)
TENNESSEE FOR APPROVAL OF)
PURCHASE AGREEMENT)
)

T.R.A. DOCKET ROOM
DOCKET NO. 03-00388

MEMORANDUM IN SUPPORT OF PETITION

Tennessee-American Water Company ("Tennessee American") amended its petition in this docket to request the Authority to grant it a Certificate of Convenience and Necessity ("CCN") to the extent that the Authority deems a CCN is necessary. Tennessee American did not initially request a CCN due to the reasoning set forth below.

First, Tennessee American's service area is defined, not by a CCN issued by the TRA, but instead by the Company's corporate charter granted by the state in 1868. Section 26 of the charter authorizes the Company "to supply with water the inhabitants of the City of Chattanooga, and the environs thereof, and all who may be along the line of the company's pipes." The word "environs" is not defined within the charter, and is not listed in *Black's Law Dictionary*, but is listed in *Barton's Legal Thesaurus* as a synonym for "outskirts" or "vicinity." As such, the Company has taken the view that its authority to serve extends beyond Chattanooga into neighboring areas, such as the Suck Creek area encompassed referenced the petition.

The second, and more important reason is that the CCN statutes do not appear to require a CCN unless the area to be served is currently being served by another private or investor-owned utility. The CCN statute, Tenn. Code Ann. § 65-4-201, provides that

(a) No public utility shall establish or begin construction of, or operate any line, plant, or system, or route in or into a municipality or other territory **already receiving a like service from another**

public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate....

(emphasis added). "Public utility," as used in the CCN statute quoted above, is defined in Tenn. Code Ann. § 65-4-101 as specifically excluding "any county, municipal corporation or other subdivision of the state of Tennessee."

In addition to the language quoted above, the CCN statute also specifically states that:

this section shall not be construed to require any public utility to obtain a certificate . . . for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another **public utility**

Tenn. Code Ann. § 65-4-201 (emphasis added). Therefore, because the Suck Creek area Tennessee American seeks to serve is currently served by Marion County, and not by a competing private company, under a plain reading of the statutes, a CCN is not required.

This interpretation of the CCN requirement is also consistent with the legislative intent evident through a reading of all of the CCN statutes. The remainder of the CCN portion of the code is concerned with prohibiting one private utility from interfering with another private utility. *See* Tenn. Code Ann. § 65-4-202 (providing a procedure for an interference complaint); *See also* Tenn. Code Ann. § 65-4-203 (requiring the TRA to first make a finding of inadequate service before allowing a competing private utility to serve an area already served by another private utility). Also, Tenn. Code Ann. § 65-4-207 provides that the CCN statutes do not apply

where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county.

The legislature, in drafting the CCN statutes, clearly intended to defer to the judgment of the local government in the territory to be served. A CCN is not required if the territory to be served is currently being served by a municipality or county utility because the intent of the

municipality or county would be evident in the franchise. Obviously, if the municipality or county grants a franchise to a private utility, as Marion County has done for the Suck Creek area, it is the will of that local government that the private utility serve the area, and the legislature deemed a CCN unnecessary. Even if the area is already being served by a competing private utility, a CCN is not necessary if the municipality or county passes a resolution that such competition is desired.

Because the Suck Creek area is currently served by Marion County, and because Marion County has passed a resolution granting Tennessee American the authority to serve the Suck Creek area, under a plain reading of the CCN statutes, a CCN is not necessarily required.

By the same token, an award of a CCN in the case is clearly justified and appropriate should the Authority determine that one is required. The evidence demonstrates that a CCN is necessary and proper for the public convenience and properly conserves and protects the public interest. Accordingly, Tennessee American requests that the Authority grant it a CCN in the event it determines one is required.

Respectfully submitted,

BAKER, DONELSON, BEARMAN
& CALDWELL, P.C.

By: 

Joe A. Conner BPR #12031

Misty Smith Kelley BPR # 19450

1800 Republic Centre

633 Chestnut Street

Chattanooga, TN 37450-1800

(423) 209-4148 (Direct Telephone)

(423) 752-9549 (Direct Facsimile)

jconner@bakerdonelson.com

mkelley@bakerdonelson.com

Counsel for Tennessee American Water

John Harvey Cameron

CAMERON & GOUGER

28 Courthouse Square

Suite 1000

P.O. Box 37347

Counsel for Marion County, Tennessee


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, to the following this 15 day of Jan, 2004:

Richard Collier, Legal Division
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Mr. Hal Novak
Energy and Water Division
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Russell Perkins
Consumer Advocate and Protection Division
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202

A handwritten signature in dark ink, appearing to read "R. Perkins", is written over a horizontal line.